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No. 01-301

Supreme Court, U.S.
FILED
FEB 8 2002
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IN THE SUPREME COURT OF THE UNITED STATES

TOM L. CAREY, *Petitioner,*

v.

TONY EUGENE SAFFOLD, *Respondent.*

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

# PETITIONER'S REPLY BRIEF ON THE MERITS

BILL LOCKYER
Attorney General of the State of California
ROBERT R. ANDERSON
Chief Assistant Attorney General
JO GRAVES
Senior Assistant Attorney General
ARNOLD O. OVEROYE
Senior Assistant Attorney General
STAN CROSS
Supervising Deputy Attorney General
Counsel of Record
1300 I Street
P.O. Box 944255
Sacramento, CA 94244-2550
Telephone: (916) 324-5158
Fax: (916) 324-2960
Counsel for Petitioner

30 PP

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**IN THE SUPREME COURT OF THE UNITED STATES**

No. 01-301

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## ARGUMENT

### I. *SAFFOLD* SHOULD BE REVERSED BECAUSE IT IS CONTRARY TO CONGRESSIONAL INTENT AND WOULD "SAP THE FEDERAL STATUTE OF MUCH OF ITS EFFECT"

In *Rose v. Lundy*, 455 U.S. 509, 517-518 (1982), this Court recognized that "the policies underlying the statutory provision" must be analyzed to determine the statute's proper scope when "'there are ambiguities in the legislative language that must be resolved'" and that "'courts should endeavor to give statutory language that meaning that nurtures the policies underlying legislation . . . when circumstances not plainly covered by the terms of a statute are subsumed by the underlying policies to which Congress was committed.'" *Id.* at 517-518, citations omitted. Petitioner submits that this Court should follow *Rose v. Lundy* and interpret the meaning of "pending" in AEDPA's tolling provision "on the basis of" the statute's "language and legislative history, and consistent with its underlying policies" with the goal of providing "a simple and clear instruction to

potential litigants . . . ." *Id.* at 520.

Although Respondent has provided this Court with an alternative interpretation of the relevant statutory language, Petitioner submits that the gap theory relied upon by the district court and recently discussed in *Robinson v. Ricks*, 163 F.Supp.2d 155 (E.D.N.Y. 2001) most accurately reflects congressional intent and the policy judgments underlying AEDPA's one-year statute of limitations. The gap theory should be adopted by this Court because it promotes federalism, comity and finality while at the same time providing a simple, clear and uniform method to toll the statute of limitations in both appellate review states and original jurisdiction states without the need to stretch statutory language. In contrast, the Ninth Circuit's indefinite tolling rule "would sap the federal statute of limitations of much of its effect" by allowing tolling for delays of months or years beyond the one-year limitations period. Furthermore, *Saffold v. Newland*, 250 F.3d 1262 (9th Cir. 2001) requires stretching of the statutory language to cover original jurisdiction states like California, disregards the policy considerations underlying the statute of limitations, and would continue the present state of confusion created by the conflict in the circuits and the diversity of state procedural law.

Before addressing the deficiencies in Respondent's interpretation of 28 U.S.C. § 2244(d)(2), Petitioner will first discuss three false premises in Respondent's brief, namely that the Ninth Circuit did not construe the California Supreme Court's order as a denial for untimeliness; that there is no circuit conflict because of his allegedly "timely" state petition; and that California's system of successive original writs is the functional equivalent of an appellate system.

### A. California Law and *Saffold* Leave No Doubt that Respondent's State Petition was Denied on the Alternative Ground of Untimeliness

Respondent's attempt to resurrect his motion to dismiss in



Argument III of his Brief on the Merits should be rejected for the reasons stated in Petitioner's December 4, 2001, opposition to that motion. Once again, Respondent provides this Court with a faulty discussion of California law and an erroneous reading of *Saffold* in an effort to convince this Court that he filed a timely petition in the California Supreme Court and that the majority opinion in *Saffold* is therefore not in conflict with the other circuits that toll the statute of limitations until the final disposition of any timely appeal relating to an application for collateral review.

In his discussion of California law, Respondent correctly points out that original petitions are subject to the general requirement that they "be filed 'within a reasonable time after the petitioner or counsel knew, or with due diligence should have known, the facts underlying the claim as well as the legal basis for the claim.'" Resp. Br. 39-40, quoting *In re Harris*, 5 Cal.4th 813, 828, n.7 (1993). However, Respondent neglects to add that *Harris* also stated that claims of ineffective assistance of counsel (the underlying claim in the instant case) "should be filed in conjunction with the direct appeal" as a verified petition for habeas corpus. *Id.*, citing *People v. Pope*, 23 Cal.3d 412, 426-427, n.17 (1979). Consequently, there can be no doubt that Judge O'Scannlain correctly observed in his *Saffold* dissent that "[i]n a case involving such dilatory behavior as this, . . . the clock must continue to run in the periods of excessive delay between the three separate habeas petitions." Pet. App. A 15.

Respondent attempts to confuse the issue by speculating that the California Supreme Court's "lack of diligence" finding might not have referred to untimeliness but rather to a conclusion that he had failed "to raise certain claims on direct appeal before pressing them on habeas." Resp. Br. 42-43, citing *In re Ronald E.*, 19 Cal.3d 315, 322, 562 P.2d 684, 688 (1977), and *In re Dixon*, 41 Cal.2d 756, 759, 264 P.2d 513 (1953). However, *In re Ronald E.* is inapposite because it did not involve an ineffective assistance of counsel claim, and *In re Dixon*, which set forth the general rule barring state habeas

petitioners from raising claims that they should have raised on direct appeal, is not applicable to Respondent's case because of the California Supreme Court's explicit exception to the *Dixon* rule set forth in *People v. Mendoza Tello*, 15 Cal.4th 264, 933 P.2d 1134 (1997) **prior** to the California Supreme Court's decision in Respondent's case.

Respondent attempts to skirt the *Tello* exception by providing this Court with a truncated quotation from *Tello* followed by the assertion that *Tello* "did not hold anything clearly to the contrary of" the general rule. Resp. Br. 44-45, n.28. However, immediately following the passage quoted by Respondent, the *Tello* court explicitly sets forth the exception to the *Dixon* rule for ineffective assistance claims, thereby refuting Respondent's speculative argument that the reference to "lack of diligence" might have reflected a determination that he should have raised his ineffective assistance claim on direct appeal rather than a finding of untimeliness. Resp. Brf. 44-45. The *Tello* court explained the exception as follows:

> **Because claims of ineffective assistance are often more appropriately litigated in a habeas corpus proceeding, the rules generally prohibiting raising an issue on habeas corpus that was, or could have been, raised on appeal** (*see . . . In re Dixon* (1953) 41 Cal.2d 756, 759 [264 P.2d 513]) **would not bar an ineffective assistance claim on habeas corpus.**

*People v. Mendoza Tello*, 15 Cal.4th at 267, citations omitted, emphasis added; *In re Robbins*, 18 Cal.4th 770, 814, n.34 (1998) [providing a detailed explanation of the court's order practice including the practice of not applying *Dixon* bars "to claims of ineffective assistance of trial counsel, even if the habeas corpus claim is based solely upon the appellate record."]. Consequently, in cases such as Respondent's where the only claims raised on collateral review concern ineffective assistance of counsel, California law is clear that a "lack of diligence" finding necessarily refers to undue delay rather than to a failure



to preserve a claim on direct appeal.[1/]

Furthermore, Respondent is manifestly incorrect in his assertion that the Ninth Circuit "did not construe the California Supreme Court's order as a denial for untimeliness" and that it "instead proceeded on the basis that the state supreme court petition had been timely filed." Resp. Br. 46. To the contrary, the majority opinion in *Saffold* repeatedly stated that the California Supreme Court's dismissal of Respondent's ineffective assistance of counsel claim was "for untimeliness." Pet. App. A 11-12. However, despite its recognition that "the California Supreme Court applied its untimeliness bar" (Pet. App. A 12), the *Saffold* court concluded that the time should remain tolled "because the dismissal for untimeliness at least partially addressed the merits" and "[a]ccordingly, such an untimeliness ruling did not constitute an independent state ground of decision." *Id.* at 11-12; *see* Judge Stewart's concurring and dissenting opinion in *Melancon v. Kaylo*, 259 F.3d 401 (5th Cir. 2001) stating that the *Saffold* "court tolled the intervening time even though the California Supreme Court had applied the untimeliness bar as an alternative ground for denying relief. *Saffold*, 250 F.3d at 1266-67." 259 F.3d at 409, J. Stewart concurring in part, dissenting in part.

In short, *Saffold* was not "premised on the conclusion that Mr. Saffold's petition to the state supreme court was timely filed" (Resp. Br. 47-48, n.31), but rather on the premise that his untimeliness under state law was in effect excused or purged for purposes of the federal statute of limitations because the state supreme court alternatively addressed the merits, thereby qualifying his late filing as "proper pursuit" in the eyes of the

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1. It should be noted that the Ninth Circuit recently reaffirmed the conclusion of *La Crosse v. Kernan*, 244 F.3d 702, 705 (9th Cir. 2001) that a California Supreme Court denial of a habeas petition citing "lack of diligence" is an application of the state's untimeliness bar. *Bennett v. Mueller*, 273 F.3d 895, 898, 902 (9th Cir. 2001).

*Saffold* majority.[2/]

**B. Respondent's Suggested "Uniformity" Among the Circuits Does Not Exist**

Respondent is simply wrong when he claims that *Saffold's* indefinite tolling rule falls within the majority approach of "providing for a **prompt**, orderly, and proper use of the state courts prior to the filing of a federal habeas petition." Resp. Br. 9, emphasis added. Delays of four and a half months, fifteen months, or more than four years sanctioned by

2. It should be noted that Respondent's attempt to bolster his argument with letters from the Clerk of the California Supreme Court advising prisoners that "there is *no deadline* within which to file a Petition for Writ of Habeas Corpus" (Resp. Br. 41, n.27) confuses "proper pursuit" with "properly filed." The letters from the Clerk merely demonstrate that state petitions will be "properly filed" whenever they are filed because there is no deadline for filing original petitions in California. Petitioner does not disagree that such a "properly filed application" in California would be entitled to tolling under § 2244(d)(2) for the period of time following the proper filing until decision by the state court. However, that is not to say that if the properly filed petition has been found to be untimely filed under state law, as in Respondent's case, that tolling should be granted for the gap between the prior denial of the intermediate appellate court and the untimely but proper filing in the state supreme court.

It should be further noted that Respondent's attempt to bolster his argument with the materials reproduced in the Appendix to his brief and the case files lodged with this Court (Resp. Br. 40-41, n.27) merely demonstrate that the California Supreme Court arguably did not regularly apply its untimeliness bar in 1998. However significant such a conclusion might be in the area of procedural bar case law, it is of no moment for the present case which concerns a statute of limitations defense rather than a procedural bar defense. In short, Respondent makes the same mistake as the Ninth Circuit by failing to recognize that resolution of the meaning of "pending" under AEDPA's statute of limitations involves determining the intent of Congress rather than applying procedural bar case law to determine whether a state supreme court ruling is based upon independent and adequate grounds which are regularly applied.



*Saffold's* indefinite tolling rule can hardly be considered to be "prompt" use of the state courts. *Welch v. Newland*, 267 F.3d 1013, 1016-1017 (9th Cir. 2001) [four-and-a-half-year delay permitted on authority of *Saffold*]; *Romero v. Roe*, 130 F.Supp.2d 1148, 1149-1151 (C.D. Cal. 2001) [15-month delay permitted on authority of *Saffold*]. There can be no doubt that the Seventh Circuit correctly identified the circuit conflict and recognized that *Saffold* opened up the possibility that delays of 10 years or more "would sap the federal statute of limitations of much of its effect" and "would give § 2244(d)(2) a Cheshire-cat like quality, both there and not there at the same time."[3/] *Fernandez v. Sternes*, 227 F.3d 977, 980-981 (7th Cir. 2000);

3. The Seventh Circuit's concern that "*Saffold* implements a make-believe approach, under which petitions are *continuously* pending whenever a state court allows an untimely filing" (227 F.3d at 981) has recently materialized in a California case where the prisoner's first federal petition had been dismissed as barred under the statute of limitations because 9 months had passed before his first state petition and another 25 months had passed since his state petition had been denied by the California Court of Appeal with no petition having been filed with the state supreme court. However, approximately three months after the dismissal of the federal petition, the prisoner finally filed a state petition in the California Supreme Court, and the federal court was bound by *Saffold's* indefinite tolling rule to find that although the first federal petition filed 21 months earlier was barred by the statute of limitations, the second federal petition was not barred. *Cate v. Ayers*, 2001 WL 1729214 at *2-3 (E.D.Cal. Dec. 28, 2001) (unreported). The court further noted that it was bound to follow *Saffold* "until such precedent is overruled by an intervening U.S. Supreme Court opinion." *Id.* at *3, n.6.

In contrast to the gap theory which provides a simple method to determine tolling, *Saffold* as well as the other circuits rejecting the gap theory subject prisoners and the federal courts to uncertainties posed by the diversity and complexity of state laws and rules pertaining to post-conviction relief or other collateral review. *See* Donald E. Wilkes, Jr., *State Postconviction Remedies and Relief*, App. A (1996 ed.); *Allen v. Mitchell*, 276 F.3d 183, 187, n.3 (4th Cir. 2001) [suggesting the necessity of an evidentiary hearing to determine whether a delay of over four years was "without reasonable delay" might be more burdensome to the state than abandoning its statute of limitations defense].

*accord*, *Melancon v. Kaylo*, 259 F.3d at 407 [rejecting *Saffold* and agreeing with the concern expressed by *Fernandez* and *Gibson v. Klinger*, 232 F.3d 799, 807 (10th Cir. 2000) "over the potential for indefinite tolling"]; *Allen v. Mitchell*, 276 F.3d at 185-186 [agreeing with the majority position of the Fifth, Seventh and Tenth Circuits and rejecting *Saffold's* rule that tolls "an untimely appellate petition . . . unless the state court expressly dismissed the petition as untimely without any examination of the merits"].

In short, Respondent's suggested "uniformity" among the circuits does not exist. As a consequence, the questions presented by Respondent in his brief on the merits are improperly framed and should be answered negatively by this Court. Respondent's first question presented should be rejected because the Ninth Circuit did not "adopt" the majority view of the courts of appeals "that a state habeas petition is pending from the initial filing of the petition until the final resolution of any *timely* requests for review." Resp. Br. i, italics added. This is apparent because, as discussed *supra* in section A, the Ninth Circuit itself concluded that the state supreme court had found Respondent's petition to be untimely. Consequently, Respondent's second question presented also should be rejected because the Ninth Circuit did not construe his "petition to the state supreme court as timely filed . . ." *Id.*

### C. Given the Prohibition of Appeal and Rehearing in California's System of Successive Original Petitions, Nothing is Pending Following Denial of a Petition by the Trial Court or the Intermediate Appellate Court Until Another Petition is Properly Filed

Respondent argues that California's "system of successive original writs is the functional equivalent of an appellate system" and that the time "a California prisoner spends seeking timely appellate review of his petition for post-conviction relief



is time that his post-conviction proceedings are 'pending' within the meaning of section 2244(d)(2) . . . ." Resp. Br. 29. Respondent is incorrect.

The California Supreme Court has consistently rejected the notion that appeal or rehearing is available following the denial of an original petition for habeas corpus unless such an appeal is explicitly provided for by statute. *France v. Superior Court*, 201 Cal. 122, 127 (1927) [the decision of any court in a *habeas corpus* proceeding cannot be reviewed by any other court in any way]; *In re Zany*, 164 Cal. 724, 726-727, 729-730 (1913) [habeas corpus proceedings cannot be reviewed by any other court; California Supreme Court has no power of transfer in habeas corpus proceedings]; *In re Washer*, 200 Cal. 598, 609 (1927) ["There is no practice here allowing petitions for rehearing in case of *habeas corpus*."]; *In re Hughes*, 159 Cal. 360, 363, 366 (1911) ["No appeal lies from a judgment given in a proceeding in *habeas corpus*."]; *Ex parte Robinson*, 71 Cal. 608, 611 (1887) ["There is no practice here allowing petitions for rehearing in cases of *habeas corpus*."]; *In re Perkins*, 2 Cal. 424, 430 (1852) [determination of a judge concerning writs of habeas corpus "is not appealable from or subject to review"].[4] The California Supreme Court's explanation of habeas corpus proceedings set forth in *Zany* is particularly instructive:

> It has always been the law in this state that the decision of any court in a *habeas corpus* proceeding, provided the court has jurisdiction, cannot be reviewed by any other court in any way. The right of appeal has never been given, and no other method for such review has ever been provided. . . . The result

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4. It should be noted that *Bunney v. Mitchell*, 262 F.3d 973, 974 (9th Cir. 2001) improperly stretched AEDPA's statute of limitations by creating the fiction that rehearing might be available under California law and by ignoring the fact that exhaustion had been completed and that nothing was pending before the state supreme court. *See Nara v. Frank*, 264 F.3d 310, 319 (3d Cir. 2001). Adoption of the gap theory by this Court would rectify *Bunney's* error.

has been that, with reference to such proceedings, the supreme and superior courts, to each of which was given the power to issue writs of *habeas corpus*, stood upon the same plane, neither being inferior to the other in any other sense than that a superior court in determining any such matter would naturally follow a precedent established by the highest court in the state, if any such precedent had been established. It however, had the *power* to disregard it, and **its determination**, whether in accord with the law as laid down by the supreme court or not, **was an end of the particular proceeding**, and in case of a discharge of the petitioner from custody was final and conclusive. . . . **Where a petitioner was remanded to custody by a superior court, and the proceeding instituted in that court was thus terminated and was no longer a matter *pending therein*, he could inaugurate a *new proceeding* for relief in another court** and can still do so, but is now limited in the **making** of **a new application** by statutory provision **to a higher court**, either the district court of appeal having jurisdiction, or the supreme court.

*In re Zany*, 164 Cal. at 726-727, italics in original, emphasis added; *see Jones v. State*, 471 S.W.2d 166, 168-169 (Mo 1971) ["appeal does not lie in habeas corpus" but prisoner may "file a **new application** for habeas corpus in an appellate court"]. With regard to the district courts of appeal, the *Zany* court further explained that "[a] *habeas corpus* proceeding **cannot fairly be said to be so "pending" at any time after judgment by such court**. **Such a proceeding is finally and definitely ended by the judgment** . . . ." *Id.* at 729, italics in original, emphasis added. Although the California Legislature has provided that the People may appeal from the granting of habeas corpus relief (Cal. Pen. Code § 1506), the California Supreme Court had repeatedly stated that a defendant may not appeal denial of a petition for writ of habeas corpus. *In re*



*Clark*, 5 Cal.4th 750, 767, n.7 (1993); *In re Hochberg*, 2 Cal.3d 870, 876 (1970), disapproved on other grounds in *In re Fields*, 51 Cal.3d 1063 (1990); *Loustalot v. Superior Court*, 30 Cal.2d 905, 913 (1947).

In short, affirmance of *Saffold's* indefinite tolling rule requires stretching AEDPA's statutory language to create a legal fiction (a non-existent appeal from a final decision) to allow tolling for the gaps between original petitions in states such as California.[5/] In contrast, no such stretching of AEDPA's language is needed to employ the gap theory across all jurisdictions.

### D. The Indefinite Tolling Rule Should be Reversed Because it Would be Inappropriate to Conclude that Congress Would Choose to Adopt State Law Rules that Are at Odds with the Language and Purpose of AEDPA's Statute of Limitations

Respondent argues that the language of AEDPA's tolling provision, 28 U.S.C. § 2244(d)(2), should be interpreted to refer to a single period because the statute uses "time" and "application" in the singular and that Petitioner's interpretation

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5. Although the traditional rule in American courts was that an order denying habeas relief was not appealable absent a statute authorizing such an appeal, "statutes allowing appeals were the clear trend" by the late nineteenth century. CJLF Br. 11; Resp. Br. 30. Nevertheless, as pointed out by the Nevada Supreme Court in *Ex parte Sullivan*, 189 P.2d 338, 342 (1948), "California is one of the fifteen or more states which, in the absence of statute providing for appeal or writ or error in habeas corpus cases, follow the common-law rule to the effect that a judgment or order in a habeas corpus proceeding is not appealable." Although the Nevada Supreme Court retains its original jurisdiction in habeas corpus, *Blair v. Crawford*, 275 F.3d 1156 (9th Cir. 2002), the Nevada Legislature joined the majority of states in 1991 by enacting Nevada Revised Statute § 34.575 providing for appeal to the supreme court from the order of a district court denying a petition for writ of habeas corpus.

of "pending" makes no sense because it allegedly would create a more harsh tolling provision for noncapital petitioners than for capital petitioners under 28 U.S.C. § 2263(b)(2). Resp. Br. 16-20. Respondent is incorrect.

First, Respondent's interpretation of § 2244(d)(2) is contrary to that of *Duncan v. Walker*, 121 S.Ct. 2120 (2001), where this Court stated that "the provision limits the harm to the interest in finality by according tolling effect only to 'properly filed application*[s]* for State post conviction or other collateral review.'" *Id.*, at 2128, brackets in original, italics added. Second, Petitioner's view that Congress contemplated tolling for the pendency of multiple applications is more consistent with the purpose and policy considerations underlying the statute. Congress sought to encourage diligence on the part of prisoners seeking collateral review and knew that although *pro se* prisoners would be able to "properly file" state petitions, they very well might not "get it right" the first time. In other words, they might fail to properly present their claims thereby resulting in dismissal without prejudice to file a new application more fully setting forth a prima facie case for their claims. *See Artuz v. Bennett*, 531 U.S. 4, 9 (2000) [recognizing that "the question whether an application has been 'properly filed' is quite separate from the question whether the claims *contained in the application* are meritorious and free of procedural bar"]. It is reasonable to conclude that Congress intended to provide tolling under § 2244(d)(2) for new properly filed applications seeking to correct deficiencies in a *pro se* prisoner's first application.

Furthermore, contrary to Respondent's view (Resp. Br. 19-20), there is more than a mere semantic difference in the wording of §§ 2244(d) and 2263(b). Section 2263(b) provides for a 180-day limitations period, tolls only for the first petition for post-conviction review, and tolls from the filing of that petition until the final State court disposition of that petition. Section 2244(d), by contrast, provides for a one-year limitations period, tolls for multiple post-conviction applications, but offsets the large added delay that tolling for multiple



applications might cause by tolling only during the pendency of those applications. These are concrete differences in operation, with specific language designed to effectuate those differences, and a sensible policy reason underlying the different rules regarding when tolling occurs.

Although most noncapital prisoners have an incentive to file meritorious applications for collateral relief prior to their sentences running, Congress certainly was aware that many noncapital prisoners are serving life terms or very long sentences and might be inclined to procrastinate or "sleep on their rights" and that many might be tempted to file meritless claims as a form of recreation or as an attack on the establishment. Congress also was aware that capital prisoners in non opt-in states have no incentive to diligently exhaust their state remedies. To take care of these problems, Congress doubled the statute of limitations in § 2244(d) over that in § 2263(b) and tolled the time during which any given properly filed application for collateral review was pending. By this, Congress intended to encourage *pro se* prisoners to diligently file their claims with state courts to receive tolling and further intended to encourage them to diligently file corrected applications, successive original applications and applications for appeal of denials. By allowing the statute of limitations to run in the gaps between properly filed applications, Congress also intended to reduce delay on the part of capital prisoners in the non opt-in states who otherwise had no incentive to exhaust their state remedies.

Contrary to Respondent's assertions, Petitioner has not abandoned the position that prisoners should not be punished under AEDPA's statute of limitations for delays beyond their control, and Petitioner's construction of § 2244(d)(2) would not generate "anomalous consequences" when a prisoner requires a trial transcript or "*wins* his state habeas case in a lower state court." Resp. Br. 23-25. In most situations the delay caused by transcript preparation or an appeal by the state will not be prolonged and will be covered by the extra six months Congress

included in the statute of limitations to deal with anticipated delays in the course of litigation by prisoners under Chapter 153. In short, minimal delays are not outside the control of the prisoner. He simply should not wait until the last minute to file his first petition, thereby causing potential difficulties by his own actions. However, in the event that long delays outside the prisoner's control actually impede filing an application, for example due to the state's failure to timely provide a necessary transcript or due to the state intentionally delaying an appeal in order to run the statute of limitations, such a delay would constitute a due process violation that would result in an additional year of tolling following the removal of the state created impediment pursuant to § 2244(d)(1)(B). *See Gardner v. California*, 393 U.S. 367, 368-370 (1969) [finding the "same invidious discrimination" caused by denial of a transcript that had been held impermissible in *Griffin v. Illinois*, 351 U.S. 12 (1956) as a due process violation and in *Long v. District Court*, 385 U.S. 192 (1966) as denial of equal protection]. Furthermore, in the event that delay caused by extraordinary circumstances outside the control of the prisoner did not qualify as a state created impediment pursuant to § 2244(d)(1)(B), such delay would merit equitable tolling given Congress's intent not to punish the prisoner for delay outside his control.

In short, the "anomalous consequences" predicted by Respondent will not come to pass because Congress drafted § 2244(d) to protect the diligent *pro se* prisoner's ability to file his state and federal applications within the one-year period. Petitioner's interpretation of § 2244(d)(2) promotes AEDPA's purpose to encourage diligent exhaustion of state court remedies. Diligent behavior in filing at each level of review is rewarded because tolling is only granted after a properly filed application is placed before a court for decision and no tolling is granted for the gaps following a court's decision at one level and prior to the next properly filed application. Thus the gap theory furnishes a strong incentive to seek relief at each successive stage of review. In contrast, *Saffold* minimizes the



incentive for a prisoner to seek relief at each successive level because he will be granted tolling as long as the state court decides (for whatever reason) to address the merits of his claims. *Saffold* saps § 2244(d) of much of its effect by ignoring congressional intent and the policy judgments underlying the statute (Pet. Br. 29-36) and at the same time creates a trap for the prisoner and "a perverse incentive for states to adopt severe default rules with narrow or no exceptions." CJLF Br. 17-18. In so doing, *Saffold* relies upon the concept of "proper pursuit" which is nowhere mentioned in § 2244(d)(2) but is instead a creation of *Barnett v. Lemaster*, 167 F.3d 1321, 1323 (10th Cir. 1999) and *Nino v. Galaza*, 183 F.3d 1003, 1006-1007 (9th Cir. 1999).

Petitioner submits that it would be inappropriate to conclude that Congress would choose to adopt state law rules that are at odds with the language and purpose of AEDPA's statute of limitations. *Cf. DelCostello v. International Brotherhood of Teamsters*, 462 U.S. 151, 161 (1983) [recognizing that "state statutes of limitations can be unsatisfactory vehicles for the enforcement of federal law" and that "it may be inappropriate" in such circumstances "to conclude that Congress would choose to adopt state rules at odds with the purpose or operation of federal substantive law"]; *Occidental Life Insurance Co. v. EEOC*, 432 U.S. 355, 367 (1977) [recognizing that "State legislatures do not devise their limitations periods with national interests in mind"]. By affirming *Saffold* and adopting Respondent's view that the states should be encouraged to change their laws and rules to promote finality (Resp. Br. 48-49), this Court would permit *Saffold* to sap § 2244(d) of much of its effect and would also undermine federalism by promoting federal interference with the sovereign states' rights to determine their own laws, procedures and rules and by encouraging states to draft state statutes that would alter the meaning of the federal statute of limitations. Petitioner respectfully submits that such an approach would be a disservice to both the federal and state

courts as well as to the interests of society.

## II. THERE IS NO INEQUITY IN ENFORCING THE STATUTE OF LIMITATIONS AGAINST RESPONDENT

*Amici* National Association of Criminal Defense Lawyers and National Association of Federal Defenders contend that a ruling by this Court enforcing the statute of limitations should be applied prospectively only. NACDL Br. 10. The argument rests on the premise that court decisions shortening well-established statutes of limitations should not be applied retroactively. Petitioner respectfully submits that the authority cited by *amici* in support of their argument does not support prospective application here. Saffold is neither constitutionally nor equitably entitled to prospective application of the statute.

"A judicial construction of a statute is an authoritative statement of what the statute meant before as well as after the decision of the case giving rise to that construction." *Rivers v. Roadway Express*, 511 U.S. 298, 313, n.12 (1994). Due process is violated only if the judicial construction was unforeseeable. *Bouie v. Columbia*, 378 U.S. 347, 353-54 (1964) [addressing the interpretation of a state criminal statute]. While reasonable jurists may differ as to the interpretation of the phrase in question, the very fact that courts have come to these different conclusions indicates that either result was "foreseeable." *Cf. Spencer v. Sutton*, 239 F.3d 626, 629 (4th Cir. 2001) [rejecting the district court's endorsement of the gap theory but recognizing that "it was entirely reasonable for the district court to have so held" given that the gap theory was not rejected by the Fourth Circuit until after the district court decision]; *Deerwester v. Carter*, 26 F.Supp.2d 1080, 1082 (C.D. Ill. 1998) [on rehearing noting that its prior support of gap theory was an appropriate interpretation but that it would "not stray from the flock" "[w]ithout a clear indication from the Seventh Circuit or the United States Supreme Court"].



*Bouie* itself described the requisite level of unforeseeability as one in which the new construction is "[without] the slightest support in prior . . . decisions." *McDonald v. Champion*, 962 F.2d 1455, 1460 n.5 (6th Cir. 1992), quoting *Bouie*, 378 U.S. at 356. In *Marks v. United States*, 430 U.S. 188, 194 (1977), this Court found due process violated by judicial expansion that "marked a significant departure" from prior precedent. In the absence of a judicial interpretation which amounts to an unpredictable shift in the law, due process is not violated. See *United States v. Balint*, 201 F.3d 928, 935-936 (7th Cir. 2000) ["Due process does not require insulating defendants when our decision merely clarifies the meaning of a statute."]; *United States v. Killion*, 30 F.3d 844, 846 (7th Cir. 1994) ["'*Bouie* applies only to unpredictable shifts in the law, not to the resolution of uncertainty that marks any evolving legal system.'"]; *United States v. Burnom*, 27 F.3d 283, 284 (7th Cir. 1994) ["That courts have rendered decisions later deemed erroneous by higher authority does not entitle criminal defendants to the benefits of those mistakes."].

Since the language of the statute at issue informed Saffold that it could be construed in the manner employed by the district court when it applied the gap theory, there is no retroactive application problem. Indeed, a contrary rule would mean that no statutes could ever have any effect until the precise meaning of each term and phrase was fully litigated.

The cases cited by *amici* in support of their argument are inapposite. They all involve situations in which the litigants filed their complaints under the belief that a longer statute of limitations period applied. After the filing of their complaints, courts overruled long lines of well established authority and ruled that a shorter period applied. In such cases, courts have held that it would be unfair to litigants to apply the new, shorter statute of limitations. For example, in *Chevron Oil Co. v. Huson*, 404 U.S. 97, 98-100 (1971) there was a line of federal decisions holding that the equitable doctrine of laches governed such actions rather than the state's one-year statute of

limitations. Similarly, in *Saint Francis College v. Al-Khazraji*, 481 U.S. 604, 608 (1987), it had been clearly established that a six-year statute of limitations period applied at the time the plaintiff therein filed suit, but subsequent decisions reduced the period to two years.

In the instant case, there was no extant authority causing Saffold to believe that indefinite gaps between state collateral filings would toll the statute of limitations. Saffold first filed in federal court on June 4, 1998, and the district court dismissed his petition for failing to meet AEDPA's statute of limitations on January 6, 1999. (J.A. 3, 65; Pet. App. E.) *Barnett v. Lemaster*, 167 F.3d 1321, *Nino v. Galaza*, 183 F.3d 1003, *Taylor v. Lee*, 186 F.3d 557 (4th Cir. 1999) and the other circuit court cases rejecting the gap theory were all filed after the district court had dismissed Saffold's federal petition. Furthermore, published cases recognizing the applicability of the one-year statute of limitations period generally began appearing as early as July 1, 1996. *United States* v. *Bazemore*, 929 F.Supp 1567, 1569 (SD Ga. 1996). *See also Curtiss* v. *Class*, 939 F.Supp. 703, 705 (W.D. S.Dak. 1996). As noted in *Taylor*, among these published cases was a published district court opinion (since abrogated by *Taylor*) espousing the gap theory. *Taylor v. Lee*, 186 F.3d at 561["*See Moseley v. French*, 961 F.Supp. 889, 892 (M.D.N.C.1997) ('The one-year period is given for the very purpose of preparing petitions, motions, etc. and, therefore, cannot be considered a tolling event.')."] Given that there were published AEDPA statute of limitations cases prior to the filing of Saffold's federal petition and given that the Circuit Court opinions rejecting the gap theory were not filed until after his federal petition was filed and dismissed, Saffold cannot credibly argue that he relied on an interpretation of AEDPA's one-year statute of limitations that rejected the gap theory. Accordingly, he has no basis upon which to request equitable relief.

With regard to the *Chevron* factors, Petitioner submits that they militate against *amici's* argument. Although many circuits



have ruled that there is statutory tolling during the various "gaps," all of those rulings came down after the date Saffold's petition was filed, and thus he cannot claim that he relied on those decisions. The second factor, regarding the intent of the statute, also cuts against *amici's* argument. The intent of Congress in enacting the statute of limitations was to "considerably speed up the habeas process." *Miller v. New Jersey*, 145 F.3d 616, 618 (3rd Cir. 1998). "The statute of limitation in Section 2244(d) was Congress' primary vehicle for streamlining the habeas review process and lending finality to state convictions." *Acosta v. Artuz*, 221 F.3d 117, 122 (2d Cir. 2000) (internal quotations omitted.) In contrast, the Ninth Circuit's indefinite tolling rule "would sap the federal statute of limitations of much of its effect" (*Fernandez v. Sternes*, 227 F.3d at 980), and substantially reduces any possibility that the habeas review process will be expedited.

Finally, the last *Chevron* factor also weighs against nonretroactive application. In weighing the equities, it is important to note that federal habeas petitioners will not be deprived of any rights whatsoever. They can still obtain both state and federal collateral review, but simply must do so within specified time limits. Moreover, to the extent individual habeas petitioners are deprived of federal habeas review under the statute of limitations, that is a procedural hurdle that Congress has already deemed to be consistent and acceptable in the context of federal habeas. Also, it cannot be overlooked that of those habeas petitioners who would be deprived of federal habeas review, the vast majority of them have already received the opportunity for complete review on direct appeal, review in this Court by way of certiorari review, and collateral review in state court, so there is no likelihood that they are being deprived of their post-conviction remedies.

## CONCLUSION

For the foregoing reasons and for the reasons set forth in the Petitioner's Brief on the Merits, Petitioner respectfully requests that this court reverse the judgment of the Ninth Circuit and reinstate the district court's dismissal of Respondent's application for writ of habeas corpus.

Dated: February 7, 2002

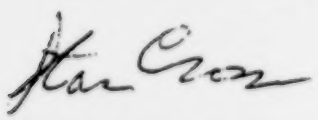
Respectfully submitted,

BILL LOCKYER
Attorney General of the State of California

ROBERT R. ANDERSON
Chief Assistant Attorney General

JO GRAVES
Senior Assistant Attorney General

ARNOLD O. OVEROYE
Senior Assistant Attorney General



STAN CROSS
Supervising Deputy Attorney General
Counsel of Record

Counsel for Petitioner

SC:sc/lbj
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